Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: May 30, 1997

CASE NO: 95-INA-633

In the Matter of:

BARTOSZ STROJEK,
Employer,

On Behalf of:

MARTA PIECZONKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Marta Pieczonka (Alien) by Bartosz Strojek (Employer) under § 212(a)(14) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and avail-

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

able at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On July 12, 1994, Employer applied for labor certification to permit it to employ the Alien on a permanent basis as a "Cook, Kosher, Live-Out," to perform the following duties in his private home:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher [meals], such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.[2]

The work week was forty hours from 9:00 AM to 6:00 PM with no overtime at the rate of $12.81 per hour. The position was classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010.[3] The application (ETA 750A) indicated as education requirements the completion of elementary and high school, and further required that applicants have two years of experience in the Job Offered.

Notice of Findings. The record indicates that the position was duly advertised, but no responses were received by the state agency, which forwarded the file to the CO with the comment that, "Logically, this does <u>not</u> appear to be a <u>full-time</u> job offer for

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[2]Due to a typographical error early in this process, the word "meals" was spelled "meats" in the application, the advertisements, etc. This was corrected above and bracketed. Applicant's rebuttal contained duplicate sets of exhibit pages that were nevertheless sequentially numbered by the CO in transmitting the Appeal File (AF). The duplicate pages were found in item #5 of AF 103, "Recipes of popular kosher dishes taken from "The Jewish American Kitchen." Because AF 38-61 repeat AF 62-85, AF 38-61 have been removed from the numbered sequence, but have been fastened together and retained in the file.

[3]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

a cook (household), as [the] only full-time employee." AF 26 [4] The CO issued a Notice of Findings (NOF) on March 27, 1995, when he denied the application, subject to rebuttal on or before May 1, 1995. AF 27-29.

The CO cited 20 CFR §§ 656.50[5] and 656.21(b)(2), and stated that Employer's May 9, 1994, letter addressing his need for a household cook was rejected as documentation that the position is permanent and fulltime. The CO explained that it is the Employer's burden of proof to establish that the job offer is fulltime and arises from business necessity and not Employer's preference or convenience. "To establish business necessity under 656.(b)(2)(i)," said the CO, "an employer must demonstrate that the job requirements bear a reasonable relation-ship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." The CO directed the Employer to establish his business necessity by providing the evidence specified in detail at 27 AF.

Rebuttal. On April 26, 1995, the Employer filed a rebuttal that included as supporting exhibits a statement by the relative who was currently cooking for the household, a physician's statements as to the health of the Employer and his parents, a group of recipes that are typical of the meals to be prepared, and other materials describing the religious objectives that the work of the cook was intended to satisfy.

In his rebuttal letter the Employer explained that he suffers from a form of colitis, and that each of his parents suffers from one or more diseases common to aging persons. All three occupants of the household require specially prepared foods in diets that are medically prescribed for the maintenance of their health, he said. In addition, it was necessary that both the food preparation and the kitchen where the food is prepared conform to the religious principles of traditional Jewish law, as the Employer and his parents are observant Orthodox Jews. After noting the well known strictures against mixing milk and meal in the meals and requiring the exclusion of non-kosher meats and fish, the Employer explained in detail the ramifications of the rules governing routine kitchen management and food preparation with which the household cook must be familiar in order to perform this job. Finally, the Employer discussed the time that was spent in the performance of this work by the relative who has cooked for the family in the recent past. This description accounted for the forty hour week expended by stating in detail the time actually consumed for each of the steps routinely

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[4]The emphasis is as in the original.

[5]This regulation has been recodified as 20 CFR § 656.3.

required to run the kitchen. Also, he explained the need for a cook that arose out of the family's weekly observance of Sabbath on Friday evening and Saturday, and the work required by the observance of other Jewish holidays and festivals, when several other members of the Employer's family customarily join the Employer and his parents for celebratory meals that have a religious significance for the participants in addition to the obvious familial and social objectives of such gatherings at this household. AF 95-99.

Final Determination. On May 17, 1995, the CO denied certification on the grounds that the Employer failed to establish that permanent fulltime employment was available in the position offered, citing the definition of "employment" in 20 CFR § 656.50 and the provisions of 20 CFR § 656.21(b)(2) as to business necessity.

Alluding to the NOF of March 27, 1995, the CO said that it did not appear feasible that the duties listed in the application constituted fulltime employment in the context of the Employer's household. Noting the Employer's explanation of the family situation that prompted the application, the CO observed that the Employer was required by the NOF to establish the job offer meets the definition of "employment" stated in 20 CFR § 656.50, that the function was customary to the Employer, and that the position arose out of a business necessity within the meaning of 20 CFR § 656.50.[6] The CO then stated the documentation that was required to demonstrate these facts.

Addressing the Employer's rebuttal the CO summarized its contents and then offered the following as a critique of the rebuttal's responses to certain items:

> In rebuttal of 4-26-95, employer states that his is an Orthodox Jewish family consisting of himself and his elderly parents, that the household is kept in strict accord with Jewish dietary law, that he and his mother are diabetic and his father has a digestive disorder, and all require a specialized diet. Employer states that his Aunt Tekhla presently prepares all meals, that she was not paid, and that she is moving to Israel and will no longer be able to do the cooking. Employer lists the number of meals served, gives the cook's schedule, and includes copies [of] recipes. Employer states that once per week, each Friday, they entertain members of the family for Sabbath, and also entertain family members on each Jewish holiday. Employer also states that business entertainment takes place on Friday. Employer complains that the requirement to list

[6]See footnote # 5, supra.

> dates of entertainment, the number of meals served, [and] the time and duration of each meal for the past 12 months is unrealistic by any reasonable standards, and imposes an undue burden. Employer offers no documentation of entertainment.
>
> It seems to us that employer has knowledge of the members of the family with whom he celebrates the Sabbath and the holidays, and it would not be an undue burden to identify the persons and list them and the dates.
>
> It also seems reasonable the employer would keep some record of business entertainment to identify business expenses, and for tax purposes. Employer failed to provide any documentation.

AF 100.[7] The CO then concluded that the Employer had failed to document that the position is permanent and fulltime, and that it was "customary with the employer." The CO concluded by denying certification, noting that the Employer failed to document his entertainment schedule, as directed, and or to demonstrate that his criteria for the position are those normally required for the performance of this job.

Appeal. The only defect that the CO cited pursuant to the Act and regulations was that the Employer failed to establish that a permanent fulltime job existed.[8] Consequently, this is the sole issue before the panel in this case.

DISCUSSION

Examination of the NOF and FD demonstrates that the CO's reasons for denying certification were based on the regulatory objectives of 20 CFR § 656.20(c) which requires that the Employer establish (1) that a bonafide job exists and (2) that the position is truly open to U.S. workers. Although this position was described in straight-forward terms and was advertised in accordance with the regulations, no U. S. workers responded to this job offer.

In the NOF, the CO required the Employer to "establish that the job offer meets the definition of 'employment' as stated in

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[7]The CO then discussed at length the housecleaning arrangements of the Employer's household, noting that the Employer had failed to identify the family members who clean the house.

[8]The Employer's brief contended that the rebuttal adequately met the demands of the NOF and then cited several decided case holdings, some of which apply to this application. It did not provide a sustained argument as to any of the issues this appeal raises, however.

the regulations, is customary to the employer and arises from a business necessity." The CO explained that the Employer may rebut this finding by

> documenting how the requirement arises from business necessity, rather than employer preference or convenience. To establish business necessity under [§] 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform[ing] the job in a reasonable manner.

AF 28. The CO then stated seven specific inquiries demanding information that the rebuttal must include, some of which lent themselves to very short answers. AF 27.

The rebuttal data that the Employer furnished accounted for forty hours of work each week, based on the schedule of the work currently being performed by his aunt, a family member who actually prepared meals as the household cook in the preceding three years. (1) The recipes that the Employer supplied were sufficiently complex to require the work of an experienced cook and the preparation steps needed were sufficient to require approximately the preparation time that the Employer suggested for both the less complicated midday meals and the more involved evening meal entrees. AF 63-85. (2) The specialized nature of the diets of the respective members of the household and kashruth laws' requirements, reasonably imply that the basic, raw ingredients of most of these dishes require care in their handling and preparation, and that a complete kitchen cleanup is required before the cooking of the next meal can begin. (3) These factors also support the Employer's assertion that the cook routinely engages in daily food shopping. AF 62.[9] (4) Similarly noting the Employer's statement that chicken fat is rendered every day, it is observed that the indicated quantity of fat needed and produced from raw ingredients as a subordinate part of the cook's duties is consistent with the rest of the evidence describing this job and the way it was performed before Employer filed this application. AF 96-98.

As the Employer expressly excluded the performance of any other housework than the use and maintenance of the household cooking facilities from the duties of the position at issue, the Employer's denial on rebuttal that the job includes housework is accepted as conclusive evidence that the job offered does not contain any such component. Compare **Henry L. Malloy(Mr. & Mrs.)**, 93-INA-355 (Oct. 5, 1994). In addition, the qualifications required are within the DOT criteria for this job. See **Susan**

[9]The time to be spent baking was also taken into consideration.

Sarandon, 95-INA-118(Oct. 29, 1996). In the process of applying the concept of "business necessity" to the hiring of an employee to work in a household, rather than in a business the Board in **Teresita Tecson**, 94-INA-014(May 30, 1995), held in general terms that

> An employer may document the 'business necessity' of a particular restrictive job requirement by presenting proof that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and (2) the requirement is essential to performing in a reasonable manner the job duties as described by the employer. **Information Industries, Inc.**, 88-INA-082 (Feb. 9, 1989)(en banc).

Alluding to the employer's requirement that applicants for that position have experience in cooking Filipino food, the panel in **Teresita Tecson** said,

> In the instant case, the specific violation listed by the CO was the Employer's requirement that applicants for the position have experience in cooking Filipino food. The first element of the **Information Industries** test is whether the job requirement bears a reasonable relationship to the occupation in the context of the Employer's business . The business in this case is the operation of the household. The job requirement is for experience in cooking Filipino food. The context of the business is that the family is from the Philippines and only wish to eat their native food. Thus, the job requirement in this case does appear to bear a reasonable relationship to the occupation in the context set forth above.

Necessarily, the components and time required to perform the duties of the permanent fulltime employment the Employer proposes in the instant application was an estimate, the sufficiency of which relies on the Employer's own credibility. The reason is that while most of the records that the CO demands may be common-place in business, it is not likely that such documentation would ordinarily be kept for the purposes of a household, which is the Employer's "business" in this context. In weighing this evidence it is considered that this estimate is based on the experience of a family member who was not a paid employee. On the other hand it is persuasive that these were tasks that the Alien would be expected to perform in the same logical sequence throughout the day during each week, and the Employer's estimates of the time needed for the various tasks were based on the actual performance of these functions over the preceding three years. Since it is based on actual experience, Employer's analysis of the nature, requirements, and demands of time to perform the job components is reliable and credible for the purposes of this proceeding, and

it is the best evidence to prove that a permanent, fulltime position does in fact exist within the meaning of the Act and regulations.

The FD indicates the CO's dissatisfaction with the Employer's response to inquiries as to the identities of his relatives and others who attended the family's weekly observance of Sabbath, home based observances of some religious festivals, and other gatherings that required food preparation by the cook. AF 95-96. The record confirms the inference that the Employer failed to supply the numbers of either family members or other guests who were present. As the Employer failed to supply this information, any finding as to the existence of permanent, fulltime employment in the position offered must be based on such evidence as he did provide. First, he affirmed that the evening meal on Friday night is larger than usual, requiring more elaborate preparation than do the meals for Monday through Thursday dinners. While the quantities of food to be made may be larger on his assertion that other members of his family would be present, Employer's failure to provide such supporting details as the numbers or identity of the relatives present limits the weight this assertion may be given to a nominal number, perhaps two or three, for which a minimal added amount of work would be needed.[10] While Employer's evidence as to such celebrations and observances cannot enlarge the overall scope of the position due to the omission of proof, such evidence as he did provide supports further inferences as to its permanent and fulltime nature, since his observance of the rituals and customs of his religion relies materially on the services of the worker to be hired to perform this job.[11]

The evidence Employer has offered in response to the NOF is sufficient to demonstrate business necessity in terms of the desire of this household to eat food that is ritually pure for reasons arising out of their religious beliefs, which at minimum deserve at least as much deference as the ethnic eating patterns of the Filipino family in **Teresita Tecson**, supra, whose reasons the Board concluded were not a mere preference or convenience of

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[10]A parallel evidentiary omission is suggested in references to business entertainment in both the rebuttal and the FD. The Employer's mention of business entertainment in his house cannot be given weight on any issue, as he did not provide the supporting details requested by the CO. See AF 100.

[11]It is further observed that the application did not state religious qualifications or training for the position be filled, which is consistent with its omission of any restrictive requirements for this position. Although he was not required to do so by the NOF, the Employer's evidence tends to show that this job is open to any qualified U.S. worker notwithstanding the religious functions inherent in some aspects of the work. 20 CFR §§ 656.20(c)(8).

the employer in that case. Business necessity in the instant proceeding, however, is also to be found in the need to provide for the medical conditions of the Employer, his mother, and his father, each of whom requires a prescribed diet to accommodate the disability of a diagnosed disease. This evidence makes germane the decision in **Gregory G. Khaklos**, 94-INA-050(Nov. 16, 1994), where the Board held,

> Based on the physician's and dietitian's opinions, Employer has documented that he and his wife have medical conditions which require a special diet. Based on the expert opinions, Employer further documented that special skills, knowledge, attention and time are required for planning their menus, shopping for the correct food ingredients and preparation of their meals. To implement the expert instructions, the employer has prepared a specific work schedule indicating when and what duties the cook would perform in different time slots. These assertions, which are reasonably specific and indicate their sources, are to be considered documentation which must be given the weight it rationally deserves. **Gencorp**, 87-INA-659(Jan. 13, 1988).

Conclusion. As the CO's reason for denying certification is that the Employer failed to sustain his burden of proof of the existence of permanent, fulltime employment in the position at issue, the record was reexamined to assess the sufficiency of Employer's proof. The evidence and the holdings on which he may rely to support his position demonstrated that this Employer has clearly sustained his burden of proving the "business necessity" of the job described in his application within the meaning of the Act and regulations.

While the CO correctly noted that Employer failed to provide supporting evidence as to the extent of the work required in the position for added work due to the family's Sabbath observance each week and religious holiday meals, and the Employer's own entertainment of business guests on occasion, the Employer did show that a bona fide job exists for a cook who will prepare the special meals he and his parents require throughout the week and on weekends. As the Employer must work at another occupation to support himself and his parents, he is not available to cook for the household and has in the past relied on a relative who will cease to be available in the future.

Moreover, the nature and content of the meals required for both the Employer and his parents are complicated by either or both the medical and the religious limitations on the food that the family members can eat, on the manner of its acquisition and preparation, and on the special rules that the maintenance of his kitchen demands. The combination of these factors leads to the conclusion that the Employer has established the need for the

services of a household cook in a permanent, fulltime position to which U. S. workers can be referred within the meaning of 20 CFR § 656.3. It is concluded that the Employer has established that a job as a domestic cook exists in his private home, that it is truly open to U. S. workers, and that a bona fide effort was made to recruit qualified, available and willing U. S. workers for this position.

Accordingly, the following order will enter.

ORDER

1. The decision of the Certifying Officer denying certification under the Act and regulations is reversed for the reasons hereinabove set forth.

2. This application is remanded to the Certifying Officer with instructions to issue the immigration certification provided by the Act and regulations, as requested by the Employer.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

BARTOSZ STROJEK, Employer,
MARTA PIECZONKA, Alien

CASE NO : 95-INA-633

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 2, 1997